Filed 1/17/19 P. v. Basulto CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GERARDO BASULTO, Defendant and Appellant.	E069551 (Super.Ct.No. RIF1701161) OPINION

APPEAL from the Superior Court of Riverside County. Larrie R. Brainard, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant, Gerardo Basulto, of several crimes stemming from two incidents with his wife, M.B., on April 19, 2016, and March 30, 2017. The jury found defendant guilty of premeditated, attempted murder (Pen. Code, §§ 664, 187, subd. (a);[1] count 1), inflicting corporal injury on a spouse (§ 273.5, subd. (a); count 2), false imprisonment by violence (§ 236; count 3), criminal threats (§ 422; count 4), assault with a deadly weapon, a knife (§ 245, subd. (a)(1); count 5), violating a protective order, a misdemeanor (§ 273.6, subd. (a); count 6), misdemeanor false imprisonment (§ 236; count 7) and misdemeanor spousal battery (§ 243, subd. (e); count 8). The jury also found defendant personally used a dangerous or deadly weapon, a knife, in counts 1 through 4.[2] (§ 12022, subd. (b)(1).)

The court sentenced defendant to seven years to life in prison for the attempted murder conviction in count 1, plus one year for the personal use enhancement on count 1; plus two years for the criminal threats conviction in count 4, plus one year for the personal use enhancement on count 4, resulting in an aggregate sentence of four years plus seven years to life. Additional terms were imposed but stayed on counts 2, 3, and 5 and on the personal use enhancements on counts 2 and 3, and concurrent terms were imposed on counts 6 through 8.

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[1] Undesignated statutory references are to the Penal Code.

[2] The information also alleged that defendant inflicted great bodily injury on M.B. in counts 1 and 2 (§ 12022.7, subd. (e)), but the court granted the People's motion to dismiss these allegations.

Defendant claims *and the People concede* that the court erroneously refused to stay the two-year term on his criminal threats conviction in count 4 along with the one-year term on the personal use enhancement in count 4. We agree. The attempted murder, criminal threats, and personal use of a knife in the commission of these crimes arose from an indivisible course of conduct and were based on the same intent and objective of frightening M.B. Thus, we modify the judgment to stay the two-year term on count 4 and the one-year term for the personal use enhancement on count 4. (§ 654.)

Defendant also claims the court violated his due process rights in giving the pattern instruction on flight. (CALCRIM No. 372.) We conclude that any error in giving the flight instruction was harmless beyond a reasonable doubt. Lastly, defendant claims his abstract of judgment must be corrected to show that a $514.58 booking fee was ordered suspended at sentencing. We remand the matter with directions to correct the abstracts of judgment to show the booking fee was ordered suspended and defendant's sentences on count 4 have been stayed. We affirm the judgment in all other respects.

II. FACTUAL BACKGROUND

A. *Prosecution Evidence*

1. The April 2016 Incident (Counts 7-8)

Defendant and M.B. were married for 20 years and have four children, but they separated in January 2016. In April 2016, M.B. and the children were living at defendant's brother's house with the brother and his family. Around midnight on April 19, 2016, M.B. arrived home from work and found defendant waiting for her outside the

house. Defendant told M.B. he wanted to talk with her inside his truck, but M.B. refused to get into defendant's truck.

Defendant became angry, grabbed M.B. by her hair, and pushed her to the ground. Next, he kicked M.B. with his foot, pulled her hair, stood her up, and tried to push her into his truck. When M.B. raised her arms to prevent defendant from pushing her into the truck, defendant hit her twice in her face. M.B. began "screaming" for her daughter, J., to help her. Defendant let M.B. go, and M.B. ran inside the house and locked the door. Defendant began "banging on the door," saying he wanted to talk and to let him inside, but M.B. told him "no." Defendant left after J. told him she had called the police. The next day, M.B. had a bruise on her face.

A police officer responded to J.'s 911 call, and saw that M.B. appeared frightened and looked as if she had been crying. Using J. as her translator, M.B. told the officer that defendant pulled her hair and dragged her six to eight feet through the grass, but M.B. said she was not physically injured and the officer did not see any injuries on M.B. Following the April 19, 2016, incident, M.B. obtained a restraining order against defendant.

2. <u>The March 2017 Incident (Counts 1-6)</u>

Around 8:30 a.m. on March 30, 2017, M.B. returned to her new home after taking her children to school, and found defendant waiting for her outside the house. Although the restraining order was still in force, defendant and M.B. had seen each other on other occasions since April 2016, and they "wanted to fix [their] situation as a couple."

Defendant told M.B. he wanted the two of them to go talk to a priest about fixing their marriage. M.B. agreed to go with defendant and got into defendant's truck. M.B. called J. and told J. she was going with defendant.

As they were driving, M.B. did not recognize where they were going and asked defendant, "we're not going to see the priest, are we?" Defendant said "no," they were going to speak to another person. He also told M.B. he was going to kill her. At first, M.B. believed defendant was trying to scare her. But defendant then parked his truck in a rural area of Cajalco, and told M.B., "Get out of the truck. "I swear to you that it's not going to hurt. It's going to be quick." M.B. was in fear and initially refused to get out of the truck.

Defendant got out of the truck and told M.B. he was going to lock her inside the truck and push the truck into a nearby ravine unless she got out. He also asked whether she wanted the truck to "end up all stained," which made her believe he wanted to kill her inside the truck. She asked defendant why he would want to do such a thing and told him, "I have done nothing to you." M.B. got out of the truck, wondering how she was going to get out of the area and escape from defendant.

Defendant demanded that M.B. walk to the front of the truck, but M.B. refused and, believing she was going to die, asked to call her children so she could say good-bye to them. Defendant took M.B.'s phone and threw it. He grabbed her hair, and showed her a knife in his right hand, and told her he was going "straight for the jugular." M.B. asked defendant to let her pray; she was trying to "buy some time" to get out of there.

Defendant raised the knife and made a jabbing motion toward M.B. M.B tried to grab defendant's hand, and the knife cut her fingers, causing them to bleed.

Defendant rubbed the blood on his face and said, "'Don't make it harder,'" which made M.B. believe he would continue to attack her. A vehicle drove by and defendant told M.B. to hide her bleeding hand, and she did. M.B. pleaded with defendant not to harm her, as defendant continued to hold the knife and point it at M.B. As they heard a small plane approaching, defendant told M.B. that once the plane had gone by her "time was up."

M.B. then heard a trailer approaching and "took off running" toward the nearby road, but defendant quickly caught up to her. M.B. felt defendant's hands behind her and fell down, tearing defendant's shirt in the process. Defendant straddled M.B. and, with the knife raised in one hand, put his other hand around her neck. He said, "'I told you not to do anything stupid. Now it's going to be worse for you.'" M.B. begged defendant to stop.

Finally, defendant stopped. He got up, took off his shirt, gave M.B. the knife and truck keys, and told M.B. to leave. M.B. drove away in the truck and defendant walked away. M.B. found her cell phone before she left the scene, but she did not call 911; she called her brother-in-law, then J. She stopped at a police station and reported defendant had attacked her. In addition to the cuts on her fingers, M.B. suffered scratches on her arm from falling on the road and an imprint on her shin from defendant's foot.

A sheriff's deputy interviewed M.B. at a police station on March 30, 2017. Again, J. served as a translator. M.B. was crying, scared, and confused. She had a bloody white shirt wrapped around her hand, drops of blood on her feet and ankles, a cut on her finger, and scratches. The deputy found tire tracks at the scene, blood in the dirt, blood spatter on the right side of the truck, and what looked like dried blood on a pocketknife M.B. gave him. M.B. did not tell the deputy that defendant tried to strangle her, but she did say he threatened to cut her jugular vein.

The parties stipulated that (1) defendant was served with a criminal protective order (§ 136.2) on December 6, 2016, which required him to have "no contact" with M.B., and that (2) defendant was present in court on March 29, 2017, for a hearing on the same protective order.

B. *Defense Evidence*

Defendant's niece, G.B., testified that M.B. exaggerates things. On April 19, 2016, G.B. heard M.B. come into the house crying and saying defendant had hit her after they argued outside. G.B. believed M.B. was exaggerating the April 19 incident. On other occasions, G.B. could hear the neighbors across the street arguing inside the neighbors' house, but she did not hear defendant and M.B. arguing that night.

III. DISCUSSION

A. *Defendant's Sentences on Count 4 Must be Stayed*

Defendant claims *and the People concede* that the court erroneously refused to stay the two-year term on his criminal threats conviction in count 4 along with the one-year term on the personal use enhancement in count 4. We agree.

Section 654 provides, in relevant part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

Section 654 bars multiple punishment for multiple criminal acts where those acts were committed during an indivisible course of conduct and were incident to a single intent and objective. (*People v. Correa* (2012) 54 Cal.4th 331, 335-336.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "However, if the defendant harbored 'multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]' [Citations.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination." (*Ibid*.) The court's express or implied findings in support of its determination that section 654 does or does not apply will be upheld on appeal if substantial evidence supports them. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

The trial court here expressly found that section 654 did not apply to defendant's criminal threats conviction in count 4 and to the personal use enhancement on count 4, notwithstanding defendant's attempted murder conviction in count 1 and the personal use enhancement in count 1. But as we explain, substantial evidence does not support this determination. Rather, the evidence indisputably shows that all of defendant's criminal threats or threats to kill M.B., both with and without the knife, and his actual attempt to kill M.B. with the knife, were part of an indivisible course of conduct which was incident to the single intent and objective of terrorizing M.B.

In rejecting defendant's claim that section 654 barred separate punishment on count 4, the court reasoned defendant threatened to kill M.B. "early on" during the March 30, 2017, incident "separate from any attempt to kill her" with the knife. The court thus implicitly found that defendant's earlier threats to kill M.B. without the knife, which occurred while defendant was driving M.B. to Cajalco in his truck, were "a separate transaction" from his later attempt to kill M.B. with the knife.

To be sure, substantial evidence shows defendant threatened to kill M.B. during the drive to Cajalco *before* he parked his truck, got the knife from the back of the truck,

and both threatened to kill *and* attempted to kill M.B. with the knife. But the record indisputably shows that defendant harbored a single intent and objective—of frightening M.B.— each time he threatened to kill her, with and without the knife, and when he attempted to kill her with the knife. In addition, there was no substantial temporal or spatial separation between defendant's earlier threats to kill M.B. without the knife and his later threats to kill and his attempt to kill M.B. with the knife, such that defendant had time to reflect and to renew his intent to frighten M.B., or to create a separate and distinct risk of harm to M.B. (Cf. *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1257 [criminal acts incident to same intent and objective but separated by sufficient time or space are divisible and may be punished separately].)

Thus, insufficient evidence supports the court's implicit conclusion that defendant engaged in a divisible course of conduct or harbored separate intents and objectives when he (1) initially threatened to kill M.B without the knife, and (2) later threatened to kill and attempted to kill M.B. with the knife. We therefore modify the judgment to stay the two-year term imposed on count 4 and the one-year term imposed on the personal use enhancement on count 4. (§ 654.)

Defendant raises an alternative claim that, in the event we were to conclude that section 654 does not bar separate punishment on his criminal threats conviction and personal use enhancement in count 4, then the personal use enhancement in count 4 must be reversed based on insufficient evidence. This alternative claim lacks merit. First, the jury was instructed that it had to unanimously agree on which of several possible acts

supported the criminal threats charge. (CALCRIM No. 3500.) As defendant argues, *if* the jury based its guilty verdict on count 4 on defendant's earlier threats to kill M.B. *without the knife*, then insufficient evidence would show that defendant personally used a knife in committing the criminal threats. But substantial evidence supports the guilty verdict on count 4 and the true finding on the personal use enhancement in count 4, because substantial evidence shows defendant personally used a knife when he *later* threatened to kill M.B. *with the knife.*

B. *Any Error in Giving CALCRIM No. 372 Was Harmless*

The jury was instructed pursuant to CALCRIM No. 372 (Defendant's Flight) that: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct."

Defendant does not challenge the application of the flight instruction to counts 7 and 8, the crimes he was convicted of committing during the April 2016 incident. As defendant concedes, substantial evidence shows defendant left the scene of the April 19 incident after J. told him she had called the police. Rather, defendant claims the court prejudicially erred in failing sua sponte to limit the flight instruction to the April 2016 incident and allowing the jury to consider the instruction in relation to counts 1 through 5, the felonies defendant was convicted of committing during the March 2017 incident. Defendant claims no evidence showed he fled the scene of the March 2017 incident; rather, the evidence showed only that he simply walked away from the scene of the

March 2017 incident after he gave M.B. the keys to his truck. On this basis, he claims his conviction in counts 1 through 5 must be reversed.

Defendant specifically claims that giving the flight instruction in relation to the March 2017 incident and counts 1 through 5 violated his due process rights because the instruction allowed the jury to draw an "*irrational* permissive inference" (italics added, capitalization & bolding omitted) that he was "aware of his guilt" based on the evidence he simply walked away from, but did not flee, the scene of the March 2017 incident. He points out that when he objected to the flight instruction, the trial court was skeptical of its application to the March 2017 incident. The court said the March 2017 incident was "very strange, and he wandered off and it was quite a while before anyone got back to the scene. So I don't know that anyone would conclude that he had fled there in connection with that, but it certainly applies to the 2016 incident." As defendant points out, the court did not limit the flight instruction to the April 2016 incident. But defendant did not request such a limiting instruction either.

In any event, the entire record shows that any error in failing to limit the flight instruction to the April 2016 incident was harmless beyond a reasonable doubt. There is no reasonable possibility that the flight instruction affected any of the guilty verdicts in counts 1 through 5 or any of the true findings on the personal use enhancements in counts 1 through 4. (*Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error is harmless beyond a reasonable doubt when there is no reasonable possibility the error affected the outcome].) To begin, the fight instruction permitted but did not require the

jury to infer that defendant was "aware of his guilt" "if [he] fled immediately after the crime was committed . . . ." It also told the jury that: "If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

Given the dearth or even the complete lack of evidence that defendant "fled" the scene of the March 2017 crimes (*People v. Pitts* (1990) 223 Cal.App.3d 606, 878 [flight manifestly requires a purpose to avoid being observed or arrested]), we discern no reasonable possibility that the jury inferred defendant was "aware of his guilt" of any of the charges or enhancements stemming from the March 2017 incident based on his act of simply walking away from the scene of the incident. Our conclusion is underscored by CALCRIM NO. 200, which told the jury that "[s]ome" of the court's instructions "may not apply, depending on your findings about the facts of the case."

Moreover, the entire record shows CALCRIM No. 372 could not have affected any of the guilty verdicts or true findings in counts 1 through 5. The prosecution's entire case for counts 1 through 5 (and count 6) was based on M.B.'s testimony and the evidence corroborating that testimony, including the blood spatter on the truck, the tire tracks at the scene, the blood in the dirt at the scene, M.B.'s bleeding fingers and other injuries, and what appeared to be dried blood on the pocketknife that M.B. showed the investigating officer shortly after the March 2017 incident. In closing argument, the prosecution urged the jury to believe M.B.'s testimony and explained that there was "a lot of independent corroborating evidence to show us what [M.B.] was testifying to is correct

and true." The jury could either have believed M.B.'s testimony or discredited it, but its verdicts and true findings show it credited her testimony. In light of the entire record, there is no reasonable possibility that CALCRIM No. 372 affected any of the verdicts or true findings in counts 1 through 5.

C. *The Abstract of Judgment (Indeterminate) Must Be Corrected to Show That the $514.58 Booking Fee Was Ordered Suspended at Sentencing*

Defendant claims and the People and we agree that defendant's abstract of judgment (indeterminate) must be corrected to show that the $514.58 booking fee, which the court initially imposed at sentencing, was ordered *suspended* at sentencing. The court's oral pronouncement of judgment generally controls over conflicting written court documents, including an abstract of judgment. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) Courts also have inherent authority to correct clerical errors in court records. (*People v. Nesbitt* (2010) 191 Cal.App.4th 227, 233.)

IV. DISPOSITION

The judgment is modified to stay defendant's two-year sentence on his criminal threats conviction in count 4 (§ 422) and the one-year sentence on his personal use enhancement in count 4 (§ 12202, subd. (b)(1)). This modification reduces defendant's *determinate* sentence from four years to one year (for the personal use enhancement on count 1) but does not affect defendant's indeterminate sentence on count 1.

The matter is remanded to the superior court with directions to prepare a supplemental sentencing minute order showing that (1) defendant's two- and one-year sentences on count 4 have been stayed (§ 654), and (2) the $514.58 booking fee was ordered suspended at sentencing. The court is further directed to (1) prepare an amended abstract of judgment (determinate) showing that the sentences on count 4 have been stayed, and (2) prepare an amended abstract of judgment (indeterminate) showing that the $514.58 booking fee (reflected in paragraph 12 of the current abstract) was ordered suspended at sentencing. The court is also directed to forward a copy of the amended abstracts of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

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FIELDS
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.